

1988

Chance Collar Inc.v. Lane Murray dba Rocky Mountain Sales and Samuel C. Thompson : Brief of Appellant

Utah Court of Appeals

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DOCKET NO. 8805-43 CA IN THE UTAH COURT OF APPEALS

FOR THE STATE OF UTAH

CHANCE COLLAR, INC.,	:	Case No. [REDACTED]
Plaintiff and Respondent,	:	
v.	:	District Court No. 12,352
LANE MURRAY, d.b.a. ROCKY	:	
MOUNTAIN SALES and SAMUEL C.	:	Category No.: 13b
THOMPSON,	:	
Defendants and Appellants.	:	

88-0543 CA

BRIEF OF APPELLANT
SAMUEL C. THOMPSON

APPEAL FROM SUMMARY JUDGMENT IN THE EIGHTH
JUDICIAL COURT IN AND FOR UTAH COUNTY,
STATE OF UTAH, IN FAVOR OF PLAINTIFF AND
DISMISSING DEFENDANT SAMUEL C. THOMPSON'S
CROSS-CLAIM

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IN THE UTAH COURT OF APPEALS

FOR THE STATE OF UTAH

CHANCE COLLAR, INC.,	:	Case No. 880455-CA
Plaintiff and Respondent,	:	
v.	:	District Court No. 12,352
LANE MURRAY, d.b.a. ROCKY	:	
MOUNTAIN SALES and SAMUEL C.	:	Category No.: 13b
THOMPSON,	:	
Defendants and Appellants.	:	

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MOUNTAIN SALES and SAMUEL C.	:	
THOMPSON,	:	
Defendants and Appellants.	:	

BRIEF OF APPELLANT
SAMUEL C. THOMPSON

STATEMENT OF JURISDICTION

This is an appeal of a summary judgment entered in what was formerly the Seventh Judicial District Court of Uintah County, State of Utah, and which is now designated as the Eighth Judicial District Court of Uintah County, State of Utah. The Utah Supreme Court had original jurisdiction of this appeal pursuant to Utah Code Ann. §78-2-2(3)(i) (1987) because the Court of Appeals does not have original appellate jurisdiction pursuant to Utah Code Ann. §78-2a-3 (1987). This Court currently has jurisdiction pursuant to a transfer of this case by the Supreme Court of Utah to this Court pursuant to the Supreme Court's authority to do so under Utah Code Ann. §78-2-2(4) and Rule 4A of the Rules of the Utah Supreme Court.

STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err in granting plaintiff's motion for summary judgment based upon the doctrine of collateral estoppel when a jury in a separate and distinct case found for an unrelated plaintiff which had brought suit on a separate and distinct transaction with the defendants?

2. Did the trial court err in granting plaintiff's motion for summary judgment based on a jury verdict in a separate case when the record in this case contains unresolved material issues of fact?

DETERMINATIVE AUTHORITY

Rule 56. Summary Judgment.

. . . .

(c) Motion and proceedings thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

Rule 56(c), Utah Rules of Civil Procedure.

STATEMENT OF CASE

A. Procedural History

The plaintiff filed its original complaint seeking to

recover the purchase price of certain drill collars it delivered to defendant Lane Murray d.b.a. as Rocky Mountain Sales. (R. 1) (Drill collars are pieces of equipment used in drilling for oil.) Thereafter, the plaintiff filed an amended complaint joining as a defendant the appellant before this Court, Samuel Thompson. (R. 21) The plaintiff alleged that Samuel Thompson acted in concert with the defendant Murray to commit fraud upon the plaintiff, and therefore, plaintiff was entitled to rescind the transaction at issue. To support this contention, the plaintiff alleged as follows:

1. That Samuel Thompson gave representatives of the plaintiff false credit information about Lane Murray which induced the plaintiff to sell the drill collars to defendant Murray. (R. 22)

2. That defendant Samuel Thompson took delivery of the equipment from defendant Murray and thereafter hid the equipment from the plaintiff and denied knowledge of its whereabouts. (R. 22) In addition, plaintiff alleged that defendant Samuel Thompson was attempting to alter or sell the drill collars. (R. 22)

3. That defendant Samuel Thompson was not a bona fide purchaser of the collars. (R. 23)

The defendant Samuel Thompson denied plaintiff's allegations and cross-claimed against defendant Lane Murray based upon the fact that he purchased the drill collars from Mr. Murray in good faith without the knowledge of plaintiff's claims and/or interest

therein and that he had fully paid for the collars. (R. 47) In the cross-claim, defendant Samuel Thompson sought relief from defendant Lane Murray should the Court find the plaintiff's interest in the drill collars superior to his. (R. 50)

On May 21, 1984, the plaintiff filed a motion to amend the amended complaint to include a cause of action based on the Utah Fraudulent Conveyances Act and causes of action alleging violation of state and federal Racketeer Influence and Corrupt Organizations Acts. (R. 98) In addition, although there is no motion to consolidate with a supporting memorandum in the record, plaintiffs filed a reply memorandum in support of a motion to consolidate which indicates a request by the plaintiffs to consolidate this case with another case pending in Uintah County at that time, LOR, Inc. v. Lane Murray d.b.a. Rocky Mountain Sales and Samuel C. Thompson, Civil No. 12386. (hereinafter LOR) (R. 105) The plaintiff sought to consolidate these two cases because plaintiff claimed the questions of law and fact were identical in each, (R. 106) and therefore, under Rule 42 of the Utah Rules of Civil Procedure, consolidation would be judicially and financially economical and efficient. (R. 106-107)

The defendant Samuel Thompson requested the court dismiss both the motion to amend the complaint (R. 119) and the motion to consolidate. (R. 113) He argued that consolidation would be improper because the cases involved two separate plaintiffs, two independent transactions and factual scenarios, and two separate

claims for relief. (R. 123) The defendant also sought to dismiss plaintiff's motion to amend because there was no evidence of a violation of state or federal racketeering laws and to allow an amendment would substantially harm defendant and defendant's business. (R. 119)

On July 29, 1984, the Honorable Richard C. Davidson denied both plaintiff's motion to consolidate the cases and the motion to amend the complaint. (R. 127)

Thereafter, on March 29, 1985, the plaintiff filed a motion seeking summary judgment that defendant Samuel Thompson was not a good-faith purchaser of the drill collars, that the plaintiff had voidable title and was entitled to rescind the transaction with Lane Murray and take possession of the collars. (R. 146) This motion was based solely on the plaintiff's allegations that the issues had already been litigated in the LOR case, and therefore, pursuant to the doctrine of collateral estoppel, plaintiff Chance Collar was entitled to judgment as a matter of law. (R. 149-153) The defendant filed a memorandum in opposition stating that summary judgment would be inappropriate due to the fact that the LOR case involved separate parties, issues and facts and there were questions of fact in the record which precluded summary judgment. (R. 158-160) To support this position, an affidavit was filed by defendant Samuel Thompson that questioned the validity of certain evidence produced and relied upon by the plaintiff. (R. 161-162) In his affidavit, Samuel Thompson

denied giving false credit information to any agent of the plaintiff, and he also denied the validity of certain telephone records that plaintiff had produced in discovery. The plaintiff sought to use these telephone records to support its allegations that the defendant Samuel Thompson had talked to agents of the plaintiff on certain days and gave those agents false credit information on Lane Murray. However, as outlined in Samuel Thompson's affidavit, the calls at issue would have been impossible because he had suffered a fire in his shop which had destroyed phone service on the dates indicated in the phone records. (R. 161) These telephone records at issue were not part of the evidence or record in the LOR case, and therefore their validity and credibility has never been addressed by a finder of fact.

After a request by Clark Allred, attorney for the plaintiff, for the court to rule on the motion for summary judgment, Judge Davidson granted plaintiff's motion in a Minute Entry dated September 9, 1985. (R. 178)

Thereafter, on September 18, 1985, nine days after the Minute Entry indicates judgment was granted, counsel for the plaintiff submitted a memorandum of attached documents supporting motion for summary judgment. (R. 179) Included in this packet were certain documents from the LOR case including:

1. The original complaint;
2. A motion, stipulation and order to intervene as a defendant filed by Samuel C. Thompson;

3. Defendant Samuel Thompson's answer, counterclaim and cross-claim;
4. The plaintiff LOR'S answer to the counterclaim;
5. A 2-page minute entry outlining the sequence of events at the trial in the LOR case;
6. The verdict form in the LOR case indicating that the plaintiff LOR was entitled to the drill collars and that defendant Samuel Thompson was not entitled to receive damages therefrom;
7. The order and judgment on the verdict; and
8. Copies of the jury instructions Nos. 10 through 20A.

Thereafter, the court entered its written summary judgment on or about October 1, 1985. A copy of the judgment is included in the addendum to this brief as Exhibit "A". This summary judgment included certain findings of fact:

1. The issues in the case of LOR, Inc. vs. Murray et al related to the ownership of certain drill collars. The issues were whether Defendant, Thompson, had acquired title to the drill collars as a good faith purchaser or had acquired the drill collars through fraud in concert with Defendant, Murray.

2. The evidence presented in LOR, Inc. vs. Murray showed a common scheme whereby Defendants, Murray and Thompson, acquired both the LOR Inc. and the Chance Collar Company drill collars by fraud. Defendant, Thompson's claim for payment for both sets of drill collars was based on the same set of transactions.

3. At the conclusion of the LOR case, the jury ruled in favor of LOR and against Defendant, Thompson.

4. The issues in this case, Chance Collar Company vs. Murray et al are identical to the issues adjudicated in LOR, Inc. vs. Murray et al.

5. The jury, after hearing the evidence, ruled against Defendant, Thompson, in the LOR case finding he was not a good faith purchaser but had acquired the drill collars by fraud. Based on the jury verdict, a final judgment on the merits has been entered.

6. Defendant, Samuel C. Thompson, in the LOR case is the same person as Samuel C. Thompson in this case.

7. The issues presented in both the LOR case and this case were completely, fully and fairly litigated at the trial of the LOR case. Both parties were represented by their lawyers and evidence regarding both the LOR drill collars and the Chance Collar Company drill collars was presented showing the common fraudulent scheme of acquiring the drill collars by the Defendants.

8. The affidavit submitted by Defendant, Thompson, in opposition to the Motion for Summary Judgment does not raise any material issues of fact as it relates to the defense of collateral estoppel.

9. Based on the doctrine of collateral estoppel, Plaintiff is entitled to judgment as a matter of law.

(R. 215-216)

From these findings the court ordered that the plaintiff's motion for summary judgment was granted and that the plaintiff was entitled to immediate possession of the 12 slick drill collars. (R. 216) The court went on to order Samuel Thompson to assist plaintiff in obtaining possession of them. (R. 216) The judgment dismissed the "counterclaim" [sic] of defendant Thompson

and reserved the issue of damages incurred by the plaintiff for two drill collars which were sold prior to the entry of the preliminary injunction in this matter. (R. 217)

Defendant sought to appeal the entry of summary judgment, (R. 221) but the Utah Supreme Court dismissed the appeal as the trial court's decision was not a final decision for purposes of appeal under Rule 54 of the Utah Rules of Appellate Procedure. Final Judgment was entered pursuant to stipulation of the parties on the reserved issues of damages and costs on June 21, 1988. (R. 255-257) Thereafter, the defendant filed its notice of this appeal on July 13, 1988. (R. 258)

B. Issues of Fact in the Record

The pleadings, affidavits, exhibits, and other documents, which comprise the record in this matter are replete with conflicting evidence on material issues of fact. These include, but may not be limited to the following:

1. As to the issue of the date of sale and delivery of the drill collars at issue in this matter:

a. The original complaint (R. 1) filed on or about September 23, 1983, and the amended complaint filed on or about February 24, 1984, (R. 21) claimed that the collars were sold the defendants on or about August 16, 1983. To support this allegations, the plaintiff attached an exhibit to both complaints which purports to be the invoice of the transaction. (R. 3 and 25) Although the date is illegible

on this Exhibit "A", it is assumed it would be August 16, 1983. In addition, this Exhibit "A" shows that a Mr. Jim Morris earned a \$240.00 commission from Chance on each collar sold to Lane Murray.

b. The affidavit of Wayne Robke (R. 29) submitted in support of plaintiff's motion for temporary restraining order and preliminary injunction also alleges the sale of the collars was on August 16, 1983, (R. 29) and that Lane Murray ordered the collars himself. (R. 29)

c. However, the plaintiff's answers to request for admissions, interrogatories and requests for production of documents (R. 57-92) are not consistent with these allegations even though Wayne Robke is identified as the person answering them. (R. 57) These documents state that the collars were ordered on July 28, 1983, and delivered on August 3, 1983. (R. 58) Inconsistently with the notations on Exhibit "A" to the complaint that Jim Morris earned a commission on the sale at issue, the answers to interrogatories also state that Jim Morris is not employed by Chance Collar, but instead is believed to be an agent of Lane Murray. The answers go on to state that Mr. Morris ordered the drill collars from Chance as an agent for Lane Murray. (R. 59)

d. Finally, the exhibit attached as Exhibit "A" to the answers to interrogatories which purports to be the sales

order and invoices for the collars is completely different than the invoice attached as Exhibit "A" to the complaint and amended complaint. Exhibit "A" to the answers is dated July 29, 1983. (R. 81)

2. As to the central issue of the alleged fraudulent credit information given by Samuel Thompson:

a. In his answer to the amended complaint, Samuel Thompson denies giving the plaintiff any credit information on Lane Murray. (R. 47)

b. In Robke's affidavit, Mr. Robke states that Mr. Murray gave Mr. Thompson's name to Chance Collar as a credit reference and that agents of Chance Collar contacted Mr. Thompson and were given the fraudulent information. (R. 29-30)

c. In answering the interrogatories, however, Mr. Robke attaches an Exhibit "B" which indicates Mr. Morris gave Mr. Thompson's name to Chance Collar as a reference. (R. 90) Further contradictions arise as to whom Mr. Thompson was to have given the fraudulent credit information. First, in his answer to Interrogatory 7(d), Mr. Robke indicates that he was the person asking the questions regarding Mr. Murray's credit. (R. 61) Yet, in the answer to interrogatory 18, Mr. Robke indicates that Debye Morgan made initial contact with Sam Thompson on July 28 and a Mr. Hugh Vogel made follow-up contact on July 29. (R. 65)

d. Finally, although the plaintiff attaches telephone records to verify these allegations, Samuel Thompson's affidavit states that his phone number was (801) 789-7198 and that there could not have been any calls to that number on the dates in question because a fire had destroyed phone service to his place of business on those days. (R. 161-162)

SUMMARY OF ARGUMENTS

I

The trial court erred in applying the doctrine of collateral estoppel to grant plaintiff's motion for summary judgment in this matter for two reasons. First, the record in this case does not contain sufficient documentation from the case already litigated and relied upon by the plaintiffs to determine if the issues in this matter are identical to those in that case. Second, the pleadings, affidavits and other documents in this record indicate that, in fact, the contrary is true, and the issues in the two cases are not identical for purposes of applying collateral estoppel.

II

The trial court was precluded from granting plaintiff's motion for summary judgment because the record in this matter contains material issues of fact, the determination of which is essential to the resolution of this case.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN APPLYING THE
DOCTRINE OF COLLATERAL ESTOPPEL TO GRANT
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

The theory and applicability of the doctrine of collateral estoppel was outlined by the Utah Supreme Court in Robertson v. Campbell, 674 P.2d 1226 (Utah 1983). In Robertson, the court stated:

Collateral estoppel is a branch of what was once lumped with other rules under the general doctrine of res judicata. Collateral estoppel is distinct from the rules of bar and merger - other branches of res judicata - in that it precludes relitigation only of issues actually tried in a prior action, and it may be invoked even though the subsequent cause of action is different from the former.

Id. at 1230 (citations omitted) (Emphasis added and in original). The court went on to emphasize that "[w]hat is critical is whether the issue that was actually litigated in the first suit was essential to resolution of that suit and is the same factual issue as that raised in the second suit." Id. (emphasis added).

The test to determine if collateral estoppel applies was outlined by this Court of Appeals in Copper State Thrift & Loan v. Bruno, 735 P.2d 387 (Utah App. 1987). In Bruno, this court stated:

The Utah Supreme Court has adopted the following test to determine if collateral estoppel applies:

1. Was the issue decided in the prior adjudication identical with the one presented in the action in question?

2. Was there a final judgment on the merits?

3. Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?

4. Was the issue in the first case competently, fully, and fairly litigated?

Id. at 389. (citing Searle Bros. v. Searle, 588 P.2d 689, 691 (Utah 1978)).

Applying these principals and elements of this test to the case currently on appeal, the trial court erred in granting plaintiff's motion for summary judgment based on the doctrine of collateral estoppel because the threshold element of the test has simply not been met. There is no evidence in the Chance record that the issues decided in the LOR case were the same as the issues in this case. Because the two cases involved separate transactions, there would have had to be evidence in the Chance record that the jury in the LOR case heard evidence and found that fraudulent credit information was relayed by Samuel Thompson to a person acting on behalf of Chance. It is clear that the issue of fraudulent credit information to the agents of LOR is not the same issue as fraudulent credit information to agents of Chance.

In addition, the issue of whether Lane Murray paid LOR for the drill collars delivered by LOR is not the same as whether Lane Murray paid Chance for separate drill collars delivered by Chance. Once again, there would have to have been evidence before the LOR jury as to nonpayment to Chance.

Although the plaintiff makes a bare, self-serving assertion in its memo in support of the motion that the issues were identical in the two cases, there is no independent evidence or documentation in the Chance record to support this claim. While the plaintiff submitted a memorandum of supporting documents from the LOR case, (R. 179) these documents were submitted nine days after Judge Davidson granted the motion for summary judgment as shown by the minute entry dated September 9, 1985. (R. 178) As a result, he could not have reviewed them prior to his decision. In addition, the documents attached do not contain information sufficient to determine if the issues were in fact identical in the two cases. There are no documents included indicating that findings of fact were made by the LOR jury and there is nothing to indicate what those findings were. Instead, the documents only show, in essence, the pleadings and the jury's verdict as to which party was entitled to possession of the drill collars at issue in the LOR case.

Further, the LOR documents submitted in the Chance case do not contain anything to indicate that the LOR jury heard evidence on a common scheme of fraudulent activity or any evidence as to acquisition of the Chance collars by fraud. Even so, these two findings are set forth in the findings of fact in the Chance summary judgment. (R. 215) As there is no basis in the record to support such statements, summary judgment was inappropriate.

Instead, in granting summary judgment and making the

findings of fact required to do so, Judge Davidson seems to rely on the fact that he presided at the LOR trial. (R. 214) This does not, however, provide an adequate basis to grant summary judgment as there is no independent evidence of the LOR findings of fact in the Chance record. As a result, any evidence of findings from the LOR case were not properly before Judge Davidson for his consideration. In addition, there is nothing in the record that the trier-of-fact in LOR even considered evidence pertaining to the defendant's transaction with this plaintiff, Chance Collar. Absent this independent documentation supporting plaintiff's bare assertion that the issues were identical and that the jury in the LOR case heard and considered the evidence to establish facts at issue in this case, the trial court erred in granting summary judgment based on collateral estoppel.

Finally, not only is there no independent evidence in the record as to the similarity of the issues, the documentation in the Chance record indicates just the opposite -- that indeed the issues were not identical. First, the record shows the plaintiffs were in no way related and that they each completed separate transactions with Lane Murray for the sale of separate drill collars. Second, early in the case, the plaintiff made a motion to consolidate the Chance case with the LOR case based on the allegations that the legal and factual issues were identical. (R. 105-107) While this motion was denied, the subsequent summary judgment was granted on essentially the same basis. The

two rulings are inherently inconsistent. Third, there was evidence produced in the Chance case that was not produced in the LOR case. In Chance, the plaintiff sought to rely on telephone records as evidence to support its allegations that Samuel Thompson gave fraudulent credit information to agents of Chance. (R. 86-91) As these records were new evidence not before the LOR jury, and the validity and credibility of this evidence was at issue due to Samuel Thompson's affidavit, (R. 161) it was inappropriate to grant plaintiff's motion for summary judgment.

Therefore, because the record is devoid of documentation to establish whether the issues in the LOR and Chance cases were identical and because the record does indicate that the cases do not have an identical set of issues, the first element of the test for collateral estoppel outlined in the Bruno case is not satisfied. Not having satisfied this initial element, the other three elements of the collateral estoppel test become irrelevant or inapplicable. As a result, collateral estoppel does not apply to this case, and the trial court erred in granting plaintiff's motion for summary judgment. It should be vacated by this court and the case should be remanded for further proceedings.

POINT II

THE TRIAL COURT ERRED IN GRANTING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT BECAUSE THE
RECORD ESTABLISHES UNRESOLVED MATERIAL ISSUES
OF FACT PRECLUDING JUDGMENT FOR THE PLAINTIFF
AS A MATTER OF LAW

Rule 56 of the Utah Rules of Civil Procedure governs motions

for summary judgment. Rule 56(c) sets forth the standard a moving party must establish to prevail on such a motion. It states, in pertinent part, that: "[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." This language, of course, precludes summary judgment where there is a dispute as to material facts. (See Bill Brown Realty, Inc. v. Abbott, 562 P.2d 238 (Utah 1977).) The guidelines for a court in approaching a motion for summary judgment were summarized by the Utah Supreme Court in Mountain States v. Atkin, Wright & Miles, 681 P.2d 1258 (Utah 1984), wherein the Utah Supreme Court stated:

[U]nder Rule 56(c), Utah R. Civ. P., summary judgment can be granted only if the record shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Doubts, uncertainties or inferences concerning issues of fact must be construed in a light most favorable to the party opposing summary judgment. Litigants must be able to present their cases fully to the court before judgment can be rendered against them unless it is obvious from the evidence before the court that the party opposing judgment can establish no right to recovery. The trial court must not weigh evidence or assess credibility.

Id. at 1261 (footnotes omitted). The Utah Supreme Court went on to state that, while findings and conclusions are unnecessary to support the granting of summary judgment, that remedy is

precluded where there are issues of fact inherent in the findings and conclusions. The court stated that "[t]he trial judge saw fit to make and enter findings and conclusions, the content of which evidence the existence of material issues of fact. Therefore, the grant of summary judgment is precluded." Id.

In the case currently on appeal, the record is replete with evidence of material issues of fact such that the trial court erred in granting plaintiff's motion for summary judgment. These issues include, but may not be limited to the following:

1. Did Lane Murray purchase drill collars from plaintiff and fail to pay for them?

a. The complaint (R. 1) and amended complaint (R. 21) allege the drill collars were purchased on August 16, 1983. To support this allegation, an invoice is attached to each as Exhibit "A". (R. 3 and 25) The answers to interrogatories state that the collars were purchased on July 28, 1983, and delivered on August 3, 1983. (R. 58) To support this answer, a completely different invoice is attached as Exhibit "A". (R. 81)

b. Exhibit "A" to the complaint shows that Jim Morris earned a commission from Chance Collar on the sale of collars to Samuel Thompson. (R. 3) In the answers to interrogatories, plaintiff claims Jim Morris worked for Lane Murray and ordered the collars from Chance Collar. (R. 59) In his affidavit, Wayne Robke states that Lane Murray himself ordered the collars. (R. 29)

2. Did defendant Samuel Thompson give agents of Chance Collar Company fraudulent credit information about Lane Murray?

a. Wayne Robke's affidavit states that defendant Lane Murray gave plaintiff the name of Samuel Thompson as a credit reference. (R. 29) In plaintiff's answers to interrogatories, Wayne Robke stated Jim Morris gave plaintiff the name of Samuel Thompson as a credit reference. (R. 90)

b. In the answer to interrogatories, 7(b), Wayne Robke, answering for plaintiff, indicates that he solicited and obtained the credit information from Samuel Thompson. (R. 60) In the answer to interrogatory 18, Mr. Robke states that this information was given to Debye Morgan and Hugh Vogel. (R. 65)

c. The plaintiff relies on telephone records to show that agents of plaintiff talked to Samuel Thompson on certain days and received the information at issue. However, in his affidavit, Samuel Thompson stated that the calls at issue could not have been made as a fire had interrupted phone service to his shop on the days at issue. (R. 162) Also, in the affidavit he again denies that he gave any credit information on Lane Murray to plaintiff at any time.

These examples of conflicting evidence in the record before the Chance court establish that there are issues of fact in this

matter essential to resolution of this case. In addition, as outlined in the Mountain States case, doubts, uncertainties and inferences concerning such issues of fact are to be construed in a light most favorable to defendant Samuel Thompson as he is the party opposing the motion, and the trial court is precluded from weighing evidence or assessing its credibility in circumstances like this. As a result, given the existence of the unresolved material issues of fact which are to have been construed in a light most favorably to Sam Thompson, it was error for the trial court to grant plaintiff's motion for summary judgment in this matter. Therefore, that judgment should be vacated and this matter remanded for further proceedings.

CONCLUSION

In granting plaintiff's motion for summary judgment, the trial court relied on the doctrine of collateral estoppel after finding that the issues in this matter were identical to those which were already litigated in the case of LOR, Inc. v. Lane Murray d.b.a. Rocky Mountain Sales and Samuel C. Thompson, Civil No 12386. However, the record indicates otherwise as the pleadings, affidavits, and other documents establish that the two cases involve separate transactions between the defendants and different plaintiffs. In addition, there is insufficient evidence and documentation in this record as to what issues and evidence were before the jury in the LOR case, and there is no indication that the jury made the findings of fact as outlined by

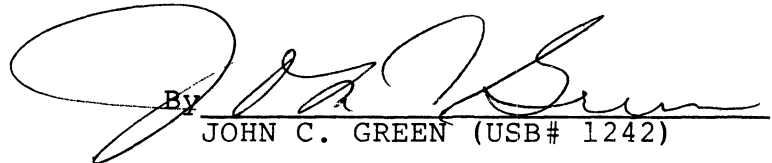
the trial court in the summary judgment.

In addition, summary judgment was precluded in this matter due to the existence of material issues of fact which are central to the resolution of this matter. These issues include whether or not Samuel Thompson gave fraudulent credit information to the plaintiff's agents, and this issue is the primary basis upon which relief was granted to plaintiffs in summary judgment.

Therefore, the trial court erred in granting plaintiff's motion for summary judgment and this court should vacate this judgment and remand this case for further proceedings.

Respectfully submitted this 3rd day of November, 1988.

GUSTIN, GREEN, STEGALL & LIAPIS

By 
JOHN C. GREEN (USB# 1242)

MAILING CERTIFICATE

I hereby certify that on this 3rd day of November, 1988, I mailed four true and correct copies of the foregoing Brief of Appellant Samuel C. Thompson, by placing such in the United States Mail, at Salt Lake City, Utah, postage prepaid and addressed to:

Clark B. Allred
Nielsen & Senior
363 East Main Street
Vernal, Utah 84078



ADDENDUM

EXHIBIT "A"

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FILED
DISTRICT COURT
UINTAH COUNTY, UTAH

OCT 1 1985

DURHAM LOCK, CLERK

BY _____ DEPUTY

IN THE SEVENTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

CHANCE COLLAR COMPANY,)	
)	SUMMARY JUDGMENT
Plaintiff,)	
)	
vs.)	
)	
LANE MURRAY dba ROCKY MOUNTAIN)	
SALES and SAMUEL C. THOMPSON,)	
)	
Defendants.)	Civil No. 12,352

The above captioned matter came before the Court pursuant to Plaintiff's Motion For Summary Judgment which motion was based on the doctrine of collateral estoppel. The Court having reviewed the Motion and Memoranda submitted by both parties and the pleadings and documents filed herein, and the Court having presided at the trial of LOR, Inc. vs. Lane Murray dba Rocky Mountain Sales and Samuel C. Thompson, Civil No. 12,386, District Court, Uintah County and being familiar with the file and having heard the testimony and having examined the documents presented at the trial of that case, and the Court having reviewed the certified copies from the LOR file and the Court being familiar with the issues raised in the LOR case and the verdict rendered in that case, hereby finds as follows:

EXHIBIT

A

1. The issues in the case of LOR, Inc. vs. Murray et al related to the ownership of certain drill collars. The issues were whether Defendant, Thompson, had acquired title to the drill collars as a good faith purchaser or had acquired the drill collars through fraud in concert with Defendant, Murray.

2. The evidence presented in LOR, Inc. vs. Murray showed a common scheme whereby Defendants, Murray and Thompson, acquired both the LOR Inc. and the Chance Collar Company drill collars by fraud. Defendant, Thompson's claim for payment for both sets of drill collars was based on the same set of transactions.

3. At the conclusion of the LOR case, the jury ruled in favor of LOR and against Defendant, Thompson.

4. The issues in this case, Chance Collar Company vs. Murray et al are identical to the issues adjudicated in LOR, Inc. vs. Murray et al.

5. The jury, after hearing the evidence, ruled against Defendant, Thompson, in the LOR case finding he was not a good faith purchaser but had acquired the drill collars by fraud. Based on the jury verdict, a final judgment on the merits has been entered.

6. Defendant, Samuel C. Thompson, in the LOR case is the same person as Samuel C. Thompson in this case.

7. The issues presented in both the LOR case and this case were completely, fully and fairly litigated at the trial of the LOR case. Both parties were represented by their lawyers and

evidence regarding both the LOR drill collars and the Chance Collar Company drill collars was presented showing the common fraudulent scheme of acquiring the drill collars by the Defendants.

8. The affidavit submitted by Defendant, Thompson, in opposition to the Motion For Summary Judgment does not raise any material issues of fact as it relates to the defense of collateral estoppel.

9. Based on the doctrine of collateral estoppel, Plaintiff is entitled to judgment as a matter of law.

The Court being fully advised, and based on the findings of the Court, it is hereby;

ORDERED, ADJUDGED and DECREED that:

1. Plaintiff's Motion For Summary Judgment is hereby granted.

2. Plaintiff, Chance Collar Company, is entitled to immediate possession of the 12 slick drill collars, 9" O.D. x 2½" I.D. x 31.6 ft. long blank ended drill collars being held pursuant to the preliminary injunction entered herein and Defendant, Thompson, is hereby ordered to deliver immediate possession of the same to Plaintiff or its representatives and the Sheriff of Uintah County, Utah is hereby ordered to assist Plaintiff in obtaining possession of those drill collars. The bond posted by the Plaintiff as a condition of the preliminary injunction is hereby discharged.

3. The counterclaim of Defendant, Thompson, against Plaintiff is hereby dismissed.

4. The issue as to any damages incurred by the Plaintiff for two drill collars which were sold prior to entry of the preliminary injunction is hereby reserved together with the question of costs.

DATED this ~~7~~ day of ~~September~~^{October}, 1985.



District Judge
Richard C. Davidson

MAILING CERTIFICATE

STATE OF UTAH)
) ss.
COUNTY OF UINTAH)

Kathleen M. Lynch, being duly sworn, says:

That she is employed in the office of NIELSEN & SENIOR,
Clark B. Allred, attorney for Chance Collar Company,
herein; that she served the attached Summary Judgment

upon counsel by placing a true and correct copy thereon in an
envelope addressed to:

John C. Green
311 South State, Suite 280
Salt Lake City, Utah 84111-2377

and deposited the same, sealed, with first class postage prepaid
thereon, in the United States mail at Vernal, Utah, on the 17th
day of September, 1985.

Kathleen M. Lynch
Kathleen M. Lynch

Subscribed and sworn to before me this 17th day of
September, 1985.

Janice Cook
Notary Public
Residing at Vernal, Utah

My Commission Expires:

Sept. 17, 1989